Supreme Court, U.S.
FILED
AUG 9 1993
OFFICE OF THE CLERK

No. 92-1441

In the Supreme Court of the United States

OCTOBER TERM, 1993

HAROLD E. STAPLES, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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39 pp

QUESTION PRESENTED

Whether the district court erred in instructing the jury that, in order to convict petitioner of a violation of 26 U.S.C. 5861(d), the government was required to prove only that petitioner knew that the weapon he possessed was a dangerous device of the type that would alert one to the likelihood of regulation, and not that he knew it possessed all the physical characteristics of a machinegun.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 971 F.2d 608. The opinion of the district court denying petitioner's motion to set aside the verdict (Pet. App. 34a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1992. A petition for rehearing was denied on November 4, 1992. On January 22, 1993, Justice White granted petitioner an extension of time to and including March 4, 1993, within which to file

a petition for a writ of certiorari. The petition was filed on that date and was granted on May 24, 1993. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. 5845 provides, in relevant part:

> For the purpose of this chapter—
>
> (a) Firearm
>
> The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.
>
> (b) Machinegun
>
> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more

> than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. 5861 provides, in relevant part:

> It shall be unlawful for any person—
>
> * * * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record * * *.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on one count of knowing possession of an unregistered machinegun, in violation of 26 U.S.C. 5861(d).[1] He was sentenced to five years'

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[1] The single-count indictment charged that petitioner "knowingly received and possessed firearms," described as follows:

> a. Inland Model M1 .30 caliber carbine, serial number 5222984;
>
> b. SGW Model XM1, .223 caliber rifle, serial number X2606
>
> both of which had been modified so as to be machineguns, and neither of which were registered to Harold E. Staples, III, in the National Firearms Registration and Transfer Record.

C.A. App. 1-2. The jury found petitioner guilty of knowing possession of the unregistered .223 caliber rifle. Tr. 477.

probation and a $5,000 fine. The court of appeals affirmed. Pet. App. 1a-31a.

1. Under 26 U.S.C. 5861(d), part of the National Firearms Act (NFA), ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. 5801-5872), it is "unlawful for any person * * * to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." The statute defines the term "firearm" to include "a machinegun," 26 U.S.C. 5845(a)(6), and it defines the term "machinegun" to mean

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include * * * any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. 5845(b).

On December 29, 1989, agents of the Jenks, Oklahoma, Police Department and the Bureau of Alcohol, Tobacco and Firearms executed a search warrant at petitioner's house. Tr. 25. The agents found an M-1 automatic carbine in a bathroom closet and an AR-15 assault rifle lacking a magazine and bolt carrier in petitioner's office. Tr. 27, 35-36. When the agents attempted to complete the search of the office, petitioner protested, claiming that it contained papers relating to an investigation in which he was assisting the FBI. Tr. 272, 278. The agents then examined a briefcase located in the portion of the office petitioner sought to prevent the agents from searching. Inside

the briefcase, the agents found an M-16 bolt carrier. Tr. 36-37.

The AR-15 is the civilian version of the military's M-16 rifle. The M-16 is a selective fire machinegun; the operator can manipulate a selector switch to fire it in either a semi-automatic or fully automatic mode. By contrast with the M-16, an unmodified AR-15 is a semi-automatic rifle; it can fire only one shot with each pull of the trigger. Tr. 111-112. At trial, however, the government's firearms expert testified that, upon examination of petitioner's AR-15, he discovered that the weapon had been modified by the substitution of certain M-16 selective fire components for AR-15 semi-automatic fire components, including a hammer, disconnector, trigger, and selector switch. Tr. 98-99.

The AR-15 is manufactured with a metal stop on its receiver to prevent an M-16 selector switch, if installed, from rotating to the fully automatic positon. Tr. 101-102. But the metal stop on petitioner's AR-15 had been filed away, leaving a shiny spot on the otherwise black receiver. *Ibid.* The government's expert explained that, with those modifications, petitioner's AR-15 was capable of firing in a fully automatic mode. Tr. 110-111. He testified that, when he test fired the weapon after inserting the M-16 bolt carrier and rotating the selector switch to the automatic fire position, it fired automatically. Tr. 104. The expert therefore concluded that the weapon was a machinegun. Tr. 105. The weapon had not been registered in the National Firearms Registration and Transfer Record, as required by 26 U.S.C. 5861(d). Tr. 58.

At trial, petitioner did not dispute that his modified AR-15 was capable of firing in an automatic

mode. Instead, he presented expert testimony that, absent an additional M-16 part, known as an auto-sear, even an AR-15 equipped with M-16 selective fire parts was not a true automatic weapon. Tr. 306, 326. Petitioner's expert further stated that, in his opinion, the automatic firing capability of petitioner's AR-15 was the result of a malfunction, known as "followdown," created by the failure of the disconnector to retain the hammer in a cocked position after the discharge of each round. Tr. 327-328. That type of malfunction, the defense expert stated, could be induced by cleaning and lubricating the weapon, reducing the number of rounds in the magazine, or using ammunication with sensitive primers. Tr. 329-330.

Petitioner testified in his own behalf. He asserted that he believed the weapon to be defective and claimed that he had been unable to get it to function in a semi-automatic mode, let alone as a fully automatic weapon. Tr. 376. As a result, he stated, he gave the AR-15 to his nephew on the condition that his nephew agree to have the weapon repaired. Tr. 377. He said that he had been keeping the weapon for his nephew, who was serving in the National Guard, when it was found in his house. Tr. 381. Petitioner denied any knowledge that the selector switch stop had been filed down or that the weapon was capable of firing in a fully automatic mode. Tr. 382, 383.

At the close of trial, petitioner proffered an instruction to the effect that "[a]n essential element of the offense of possessing a machinegun, is that the possessor knew that the gun would fire fully automatically and the burden is upon the [prosecu-

tion] to prove that specific knowledge." Pet. App. 11a n.6. The district court declined to give that instruction. Instead, the court instructed the jury that "[t]he indictment charges that the defendant knowingly possessed two different firearms." Tr. 464. With respect to the element of knowledge, the court explained (Tr. 465):

> [A] person is knowingly in possession of a thing if his possession occurred voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one can be convicted of possession of a firearm he did not intend to possess. The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it][2] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation. If he has such knowledge and if the particular item is, in fact, regulated, then that person acts at his peril. Mere possession of an unregistered firearm is a violation of the law of the United States, and it is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed the firearm.

After the jury returned a verdict of guilty, petitioner moved to set it aside on the ground that the government had failed to establish that he knew the rifle was capable of firing in a fully automatic mode.

[2] In an apparent mistranscription, the transcript contains the word "suggested" instead of "which subjects it."

Relying upon the holding of the Tenth Circuit in *United States* v. *Mittleider*, 835 F.2d 769, 774 (1987), cert. denied, 485 U.S. 980 (1988), the district court denied petitioner's motion. Pet. App. 34a.

3. The court of appeals affirmed, rejecting petitioner's claim that the district court had improperly instructed the jury on the knowledge requirement under Section 5861(d). Following circuit precedent, the court held that, in order to obtain a conviction under 26 U.S.C. 5861(d), " 'the government is not required to prove knowledge of a weapon's physical properties' "—in particular, that it is capable of automatic fire. Pet. App. 11a, quoting *United States* v. *Mittleider*, 835 F.2d at 774.

Judge Ebel concurred on the ground that the court was bound by its earlier holding in *Mittleider*. However, because he believed that the statute, as construed in that case, could lead to unfortunate results where a defendant is truly ignorant of a firearm's capability to fire automatically, he would have required proof of the defendant's knowledge of that capability had he not been bound by circuit precedent. Pet. App. 22a-31a.

SUMMARY OF ARGUMENT

By its terms, 26 U.S.C. 5861(d) does not require the government to prove that a defendant charged with possession of an unregistered weapon knew that the weapon had all of the characteristics subjecting it to registration under the National Firearms Act. The court of appeals correctly held that it would be inappropriate to read such a requirement into the statute.

This Court has held, in two categories of cases, that similar knowledge requirements may be read

into criminal statutes that do not specify an intent element. First, where a statute codifies a common law crime, it is assumed that Congress did not intend to alter the intent applicable to the common law crime. See *Morissette* v. *United States*, 342 U.S. 246 (1952). Second, where a statute criminalizes apparently innocent conduct that does not appear to present a hazard to the community, the Court has held that implication of a similar knowledge requirement may be appropriate. See *Liparota* v. *United States*, 471 U.S. 419 (1985).

This case does not fall within either of those two categories. Instead, it falls within a third category of offenses by which Congress seeks to regulate highly dangerous items that reasonably should be known to be subject to regulation. In a series of cases dealing with offenses involving regulation of narcotics, see *United States* v. *Balint*, 258 U.S. 250 (1922), misbranded or adulterated drugs, see *United States* v. *Dotterweich*, 320 U.S. 277 (1943), and shipment of hazardous substances, see *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558 (1971), this Court has made clear that the highly dangerous nature of those substances, coupled with Congress's intent to impose a regime of strict control of such substances, renders implication of a rigorous knowledge requirement inappropriate. A defendant may be convicted of such offenses so long as the government proves that he knew the item at issue was highly dangerous and of a type likely to be subject to regulation.

The rationale of those cases is directly applicable to Section 5861(d), which was enacted as a public welfare measure to regulate the circulation of highly

dangerous weapons such as machineguns. In *United States* v. *Freed*, 401 U.S. 601 (1971), this Court applied that rationale to the question whether the government must prove that a defendant under Section 5861(d) knew that the weapon he possessed was unregistered. In light of *Freed*, a substantial majority of the courts of appeals have held that conviction under Section 5861(d) does not require proof that the defendant knew the weapon he possessed had all the physical characteristics of a weapon required to be registered under federal law.

Petitioner contends that the legislative history of various amendments to the National Firearms Act supports his position. But those amendments demonstrate Congress's desire to regulate "convertible" weapons of the type possessed by petitioner in this case. They also show that Congress has consistently refused to add knowledge requirements to Section 5861(d) that would put a premium on ignorance and make it more difficult to achieve the goal of universal registration of machineguns and other registrable weapons. And Congress's refusal to do so has come at a time when it was imposing just such knowledge requirements with respect to other NFA offenses and even though at the time Congress acted the unanimous course of judicial decisions had rejected petitioner's construction of the statute.

Contrary to petitioner's contention, it would not be appropriate to apply the rule of lenity to read a rigorous knowledge requirement into Section 5861(d). There is no ambiguity in that provision that would trigger application of the rule of lenity, and such a requirement would be inconsistent with Congress's regulatory purpose in enacting the NFA. Moreover,

this Court has never applied the rule of lenity to read a rigid knowledge requirement into other public welfare statutes imposing similar registration or regulatory requirements on items that are inherently dangerous to the community.

ARGUMENT

IN A PROSECUTION UNDER 26 U.S.C. 5861, IT IS UNNECESSARY FOR THE GOVERNMENT TO PROVE THAT THE DEFENDANT HAD ACTUAL KNOWLEDGE THAT A FIREARM IN HIS POSSESSION HAD ALL OF THE PHYSICAL CHARACTERISTICS MAKING IT SUBJECT TO REGISTRATION UNDER THE NATIONAL FIREARMS ACT

Section 5861(d) provides that "[i]t shall be unlawful for any person * * * to receive or possess a firearm which is not registered to him in the United States Firearms Registration and Transfer Record." The plain language of the statute requires proof by the government that a defendant charged with violating Section 5861(d) "receiv[ed]" or "possess[ed]" a "firearm" and that the "firearm" was not registered in the Firearms Registration and Transfer Record. Although petitioner challenged the instructions and the adequacy of the evidence on those elements in the courts below, he did not renew his challenge in his petition for certiorari. Therefore, it must be taken as settled that the weapon at issue in this case—petitioner's modified AR-15—was a machinegun as defined by the statute and was possessed by petitioner as charged in the indictment.[3]

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[3] Petitioner contends that the modified AR-15 was not capable of fully automatic fire without the "autosear" described by his expert witness, and that "the government

The plain language of Section 5861(d) does not require the government to prove any element of knowledge or intent and, in particular, it does not require the government to prove that petitioner knew that the AR-15 he possessed was capable of automatic

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wholly failed to establish when the selector switch [stop] [on his AR-15] was * * * ground off" so as to permit movement of the selector switch to an automatic firing position. Pet. Br. 4, 8, 32-33. Although petitioner presented evidence on those points, see Pet. Br. 31-32, the jury apparently credited the government's evidence rather than petitioner's.

More specifically, the government's expert witness testified that he had test-fired petitioner's weapon and that, even without an autosear, it fired automatically when the selector switch was set to the "automatic" position and the weapon was loaded with commercially available ammunition. Tr. 104; see Tr. 193. The government's expert specifically denied the suggestion of petitioner's counsel that the automatic firing was the result of a "malfunction." Tr. 194. As to the date of the modification, the dealer from whom petitioner purchased the AR-15 in 1983 testified that the selector switch stop was intact at the time of the sale. Tr. 264. And petitioner concedes (Br. 32-33), that one of the federal agents who participated in the search of petitioner's residence testified that at the time of the search he noticed "[the] dot on the side of the receiver of the weapon," which "indicated that the post had been grinded off to allow the selector switch to go into a fully automatic position." Tr. 39, 40.

Nor is there a factual basis for petitioner's related assertion (Pet. Br. 6) that the government's expert witness conceded at trial that petitioner's AR-15 could not have been registered in the National Firearms Register and Transfer Record because it lacked an autosear. In fact, the witness testified that it could not have been registered "the day before [petitioner's] house was searched" because it was contraband. After May 16, 1986, the private ownership of "newly manufactured machineguns [by] civilians" was impermissible. Tr. 217. See 18 U.S.C. 922(o).

fire. The question in this case is thus whether such a requirement should be read into the statute. Because the National Firearms Act is a regulatory statute, designed to ensure that highly dangerous weapons are either registered to their proper owners or removed from circulation, the court of appeals correctly required the government to prove only that petitioner knew that he possessed a dangerous weapon likely to be subject to regulation. That requirement is consonant with the language and purposes of the National Firearms Act, with this Court's cases concerning intent requirements in public welfare statutes, and with the decisions of a substantial majority of the courts of appeals that have addressed the question.

A. Section 5861 Is A Public Welfare Offense To Which A Rigorous Knowledge Requirement Is Inapplicable

This Court has on several occasions construed criminal statutes that do not specify an element of intent. Perhaps the leading case on that subject is *Morissette* v. *United States*, 342 U.S. 246 (1952). *Morissette* involved the question of what mental element is applicable to the offense of knowing conversion of government property, in violation of 18 U.S.C. 641. To answer that question, the Court distinguished between statutes "merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states" and those "creating an offense new to general law, for whose definition the courts have no guidance except the Act." 342 U.S. at 262.

1. With respect to the first category—traditional common law offenses and their statutory analogues—the Court observed that, as a historical matter "[c]rime, as a compound concept, generally consti-

tuted only from concurrence of an evil-meaning mind with an evil-doing hand." 342 U.S. at 251. Thus, in the case of statutory offenses derived from common law crimes, "th[e] courts assumed that omission [of language concerning mental state] did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Id.* at 252.[4]

The offense at issue in *Morissette* plainly fell within the category of codified common law crimes. Accordingly, the Court reversed the trial court's refusal to permit the defendant to argue to the jury that he believed the property he stole had been abandoned. That belief, if proved, would have constituted a defense to the charge of theft of government property.

2. *Morissette* did not, however, establish a rule that all criminal statutes that omit intent requirements should be construed to require proof that the defendant intended to commit a wrongful act. The Court distinguished the case before it from cases involving "public welfare offenses" that "do not fit neatly into any * * * accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals * * * but are in the nature of neglect where the law requires care,

[4] See also 342 U.S. at 263 ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.").

or inaction where it imposes a duty." 342 U.S. at 255. The Court explained that " 'such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.' " *Id.* at 260, quoting *United States* v. *Dotterweich*, 320 U.S. 277, 280-281 (1943).

3. The offense at issue in this case is a public welfare offense of the sort discussed in *Morissette*. There is no common law analogue to the offense of possession of an unregistered firearm under the National Firearms Act. Moreover, Congress enacted the NFA's provisions requiring registration and taxation of firearms to penalize "neglect where the law requires care," and thereby control the "public danger" posed by free circulation of hazardous weapons.

Although the definition of "machinegun" has been modified on several occasions, the statute as originally enacted in 1934 required registration and taxation of machineguns and made it unlawful to receive or possess a machinegun that had been unlawfully transferred. Act of June 26, 1934, ch. 757, §§ 4(a), 14, 48 Stat. 1236, 1237-1238, 1240. In 1934 (as today), gangster violence was a problem of enormous public concern, and the weapon of choice for the criminals whose feats terrorized the public was the machinegun. The House committee report on the bill stated that "[t]he gangster as a law violator must be deprived of his most dangerous weapon, the machine gun." H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934). As Attorney General Cummings testified, "we must, if we are going to be successful in this effort to suppress crime in America, take these ma-

chines guns out of the hands of the criminal class." *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 6 (1934). Stringent registration of machineguns, backed up by harsh penalties for failure to register, was thought to be the most effective means then available to the federal government to accomplish that end.[5] As the Committee explained, "there is no reason why anyone except a law officer should have a machine gun." H.R. Rep. No. 1780, *supra*, at 1.

B. The Intent Requirement Applicable To Section 5861(d) Is Knowledge That One Is Dealing With A Dangerous Item Of A Type Likely To Be Subject To Regulation

1. Absent clear direction in the statute, the intent element to be implied in definitions of public regulatory offenses varies in accordance with the nature of the offense. In cases in which the offense involves regulation of an item that would not ordinarily be considered a hazard to the community, a rigorous

[5] There was substantial doubt, at the time the statute was enacted, that the federal government had constitutional authority to impose an outright ban on machineguns. See generally David Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumberland L. Rev. 585, 591 (1987). Accordingly, Attorney General Cummings explained that "[w]e have followed the Harrison Anti-Narcotic Act in language so as to get the benefit of any possible interpretation that the courts may have made of that act." *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 6 (1934). The constitutionality of the Harrison Act had been upheld in *United States* v. *Doremus*, 249 U.S. 86 (1919). Congress has since concluded that a ban on machineguns is well within its constitutional authority and has enacted such a ban. See 18 U.S.C. 922(o).

knowledge element may be implied. That principle was the basis for this Court's decisions in *Liparota* v. *United States*, 471 U.S. 419 (1985), and *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).

Liparota involved a prosecution for unauthorized acquisition or possession of food stamps. This Court held that the government was required to prove that the defendant knew that his acquisition or possession of food stamps was unauthorized by statute or regulation--*i.e.*, that his conduct was wrongful. Any other result would have risked "criminaliz[ing] a broad range of apparently innocent conduct," such as simply tearing up and throwing away food stamp coupons that were sent to an individual by mistake. 471 U.S. at 426.

United States Gypsum involved a criminal prosecution for price-fixing under the Sherman Act, 15 U.S.C. 1. The Court held that the Sherman Act, though silent on the issue of intent, required proof that the defendants knew that their conduct—interseller price verification—would have an effect on prices. 438 U.S. at 444. The Court based that conclusion in part on the fact that the "behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Id.* at 440-441. Serious fair notice and overdeterrence problems would be raised by criminal regulation of conduct that was apparently innocent and posed no obvious risk of danger to the community. Cf. *Lambert* v. *California*, 355 U.S. 225, 228-230 (1957).

But where a criminal statute involves regulation of a highly hazardous substance—and especially where it penalizes a failure to act or to comply with a registration scheme—the defendant's knowledge

that he was dealing with such a substance and that it was likely to be subject to regulation provides sufficient intent to support a conviction. In *United States* v. *Dotterweich*, 320 U.S. 277, 280-281 (1943), for example, the Court held that a statute prohibiting introduction of adulterated or misbranded drugs into interstate commerce was "a now familiar type of legislation whereby penalties serve as effective means of regulation." 320 U.S. at 280-281. A statute defining an offense of that type "dispenses with the conventional requirement of criminal conduct—awareness of some wrongdoing." *Id.* at 281. Instead, "[i]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Ibid.*

Dotterweich relied on this Court's earlier decision in *United States* v. *Balint*, 258 U.S. 250 (1922). *Balint* involved the violation of a narcotics statute imposing a recordkeeping requirement analogous to

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[6] As the Seventh Circuit recently explained, with respect to the precise issue in this case,

> [m]any persons must own old guns that may or may not be capable of automatic fire. Congress wants the automatic guns registered. That is going to happen only if the onus is on the owner. The approach [adopted by the courts below] requires the owner to investigate, and so leads to compliance with the law. The approach [proposed by petitioner in this case] converts ignorance into bliss. * * * Rational people would turn a blind eye, which would defeat the purpose of the statute.

United States v. *Ross*, 917 F.2d 997, 1001 (7th Cir. 1990), cert. denied, 498 U.S. 1122 (1991).

the NFA's registration requirement. The defendants in that case were charged with making a sale without filling out the requisite form. The Court held that the government need not prove that the defendants "had sold the inhibited drugs knowing them to be such." 258 U.S. at 251. Like the NFA, the narcotics statute was intended to "secur[e] a close supervision of the business of dealing in these dangerous drugs" and Congress had "use[d] a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic." *Id.* at 254. Construing the statute to impose a rigorous knowledge requirement would contravene the statutory purpose "to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute." *Ibid.*

The same point was made by this Court in *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558 (1971). The Court in that case specifically distinguished offenses regulating such commonplace, innocent items as "[p]encils, dental floss, [and] paper clips" from those regulating "dangerous or deleterious devices." *Id.* at 564, 565. With respect to such dangerous items, the "probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565. In those circumstances, "a reasonable person should know" that the item "is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota*, 471 U.S. at 433.

Dotterweich, *Balint*, and *International Minerals* do not establish that Congress ordinarily intends to dispense altogether with the requirement of criminal in-

tent in public regulatory offenses. See 402 U.S. at 563. Rather, absent contrary congressional direction, knowledge of the highly dangerous nature of the articles involved and the likelihood that they are subject to regulation takes the place of the more rigorous knowledge requirement applicable where apparently innocent and harmless devices are subject to regulation. Thus, in the context of the statute in *International Minerals* prohibiting shipment of sulfuric acid not listed on shipping papers, the Court explained that "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered [by the statute]." *Id.* at 563-564. But, so long as he knew that "some dangerous acid" was involved —even though he may not have been aware that it was sulfuric acid—his carelessness in failing to ascertain its nature and regulatory status was sufficient to establish a violation. Cf. *Dotterweich*, 320 U.S. at 281 (defendant must be shown to "stand[] in responsible relation to a public danger").

2. In *United States* v. *Freed*, 401 U.S. 601 (1971), this Court applied those principles to the statute at issue in this case—26 U.S.C. 5861(d). *Freed* presented the question whether the government had to prove that a defendant charged with receipt or possession of unregistered hand grenades knew that the hand grenades were unregistered. The Court observed that by its terms "[t]he Act requires no specific intent or knowledge that the hand grenades were unregistered." 401 U.S. at 607. The Court refused to imply such a requirement, noting that, unlike the larceny statute considered in *Morissette*, "[t]his is a regulatory measure in the interest of the public

safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609.

To be sure, the Court in *Freed* did not consider the specific question presented by this case. Because all grenades are classified as "firearms," the defendant did not argue that he mistook the grenades in his possession for articles he lawfully could have owned without registration. But the Court's reasoning in *Freed* is directly applicable here. The Court in *Freed* observed that "[b]y the lower court decisions at the time that requirement was written into the Act the only knowledge required to be proved was knowledge that the instrument possessed was a firearm." *Freed*, 401 U.S. at 607. The Court then cited *Sipes* v. *United States*, 321 F.2d 174, 179 (8th Cir.) (Blackmun, J.), cert denied, 375 U.S. 913 (1963). That case involved possession of a short-barreled rifle, which is also a "firearm" under the National Firearms Act, see 26 U.S.C. 5845(a)(3). In the cited passage, the Eighth Circuit concluded that there was "no question" that the possession was "knowing," since the defendant had "possessed it for several days" and "knew it was a gun." 321 F.2d at 179. There is no reference in the Eighth Circuit's opinion to the defendant's knowledge that the rifle possessed all of the physical characteristics of a short-barreled rifle subjecting it to registration under the NFA—*i.e.*, that its barrel was shorter than sixteen inches. See 26 U.S.C. 5845(a)(3) (defining "firearm" to include "a rifle having a barrel or barrels of less than 16 inches in length"). Thus, the understanding of both this Court and the lower courts at the time of *Freed* was that the government need

not prove that a defendant charged with violating Section 5861(d) knew that the weapon possessed all of the physical characteristics that brought it within the NFA's registration requirement.

3. The application of the principles of *Dotterweich* and *Balint* to the National Firearms Act is particularly appropriate. As in the case of misbranded drugs (in *Dotterweich*) or narcotics (in *Balint*), even guns that are not subject to the strictures of the NFA are typically governed by federal, state, and local regulation. See, *e.g.*, 18 U.S.C. 921-930; Okla. Stat. Ann. tit. 21, §§ 1272-1280, 1283, 1288-1289 (West 1983 & Supp. 1993). Thus, "one would hardly be surprised to learn" (*Freed*, 401 U.S. at 609) that there are laws that affect one's rights of gun ownership. It is consequently reasonable to "impose on the [gun owner] the burden of finding out the facts upon which his liability * * * depends and meeting it at the peril of punishment." *Balint*, 258 U.S. at 252.

The fact that the theory of defense at issue in this case could be classified as "mistake of fact" does not alter that conclusion. Although *International Minerals* involved a mistake of law,[7] *Balint*, *Dotterweich*, and *Freed* all involved mistakes of fact. In *Balint*, the Court squarely rejected the defendants' claim "that punishment of a person for an act in violation of law *when ignorant of the facts making it so* is an absence of due process of law." 258 U.S. at 252 (emphasis added). The Court explained that the emphasis of regulatory statutes such as the Narcotics Act—the statute on which the NFA was patterned, see note 5, *supra*—is "achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*." *Ibid.* Therefore, one who acts in the regulated areas does so "at his peril and will not be heard to plead in defense good faith or ignorance." *Ibid.* (emphasis added). Similarly, in *Dotterweich*, the Court cited *Balint* and emphasized that a drug "may be misbranded [or adulterated] without any conscious fraud at all." 320 U.S. at 281. And in *Freed*, the Court specifically held that the NFA "requires no specific intent or knowledge that the hand grenades were unregistered." 401 U.S. at 607. The same reasoning leads to the parallel conclusion that petitioner could have violated the NFA without knowing that his weapon was a machinegun.

4. The intent instruction given in this case was an accurate statement of the law. The instruction required the government to prove that petitioner "knowingly" possessed the machinegun, Tr. 464, and that it was possessed "voluntarily and intentionally and not because of mistake or accident or other innocent reason." Tr. 465. But the instruction did not require the government to prove that petitioner knew his weapon "possess[ed] every last characteristic [which subjects it] to regulation"; he need only have "know[n] that he [was] dealing with a dangerous device of a type as would alert one to the likelihood of regulation." Tr. 465.

That instruction accurately describes the mental state necessary for a violation of Section 5861(d). Under the instruction, a defendant who possessed what he thought was a toy or a violin case, but which in fact was a machinegun, could not be convicted.

[7] See 402 U.S. at 560 ("[t]he sole and narrow question is whether 'knowledge' of the regulation is * * * required"). But see *id.* at 563-564 (knowledge that "some dangerous acid" is being shipped is sufficient intent to violate statute imposing recordkeeping requirement on shipment of sulfuric acid).

But proof that a defendant was on fair notice that the item he possessed was highly dangerous and likely to be regulated is sufficient to support a conviction. By showing that petitioner was "standing in responsible relation to a public danger," *Dotterweich*, 320 U.S. at 281, and that he knew he possessed an item whose "probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation," *International Minerals*, 402 U.S. at 565, the government proved that petitioner had the *mens rea* necessary to violate Section 5861(d).

5. The instruction given by the district court also comports with instructions approved by most courts of appeals. As the First Circuit held in *United States* v. *De Bartolo*, 482 F.2d 312, 316 (1st Cir. 1973), "[i]t is enough to prove [the defendant] knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril." See also, *e.g.*, *United States* v. *Kindred*, 931 F.2d 609, 612 (9th Cir. 1991); *United States* v. *Ross*, 917 F.2d 997, 1001 (7th Cir. 1990) (knowledge "that the object is a firearm [in the ordinary sense] *or* a statutory firearm * * * *or* a dangerous device apt to be regulated"), cert. denied, 498 U.S. 1122 (1991); *United States* v. *Thomas*, 531 F.2d 419, 421 (9th Cir.), cert. denied, 425 U.S. 996 (1976). Other courts of appeals have reached a similar conclusion, phrasing their test in terms of whether the defendant knew that the weapon was "a firearm, within the general meaning of that term." *United States* v. *Vasquez*, 476 F.2d 730, 732 (5th Cir.), cert. denied, 414 U.S. 836 (1973). Accord *United States* v. *Mittleider*, 835

F.2d 769, 774 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988); *United States* v. *Shilling*, 826 F.2d 1365, 1368 (4th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); *Morgan* v. *United States*, 564 F.2d 803, 805 (8th Cir. 1977); *United States* v. *Ranney*, 524 F.2d 830, 832 (7th Cir. 1975), cert. denied, 424 U.S. 922 (1976). Only the court of appeals in *United States* v. *Harris*, 959 F.2d 246 (D.C. Cir.), cert. denied, 113 S. Ct. 362 (1992), has taken the contrary position, requiring proof in every case that the defendant knew the machinegun he possessed was capable of automatic fire.[8]

C. The Legislative History Of The NFA Supports The Tenth Circuit's Decision

1. Petitioner contends (Pet. Br. 38-42) that the legislative history of amendments to the NFA supports construction of the statute to require the government to prove that a defendant knew that his weapon possessed all of the characteristics necessary for regulation under the NFA. A primary purpose of the NFA as originally enacted was to exercise stringent control over the circulation of machineguns through a strict registration and taxation scheme.

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[8] Three circuits have taken an intermediate position. They have held that, although knowledge of a weapon's specific characteristics generally is not required, such knowledge is required when the external appearance of the weapon gives no indication that it is a machinegun, even though internal modifications have rendered it susceptible to automatic firing. See *United States* v. *Anderson*, 885 F.2d 1248, 1251-1255 (5th Cir. 1989) (en banc); *United States* v. *Williams*, 872 F.2d 773, 777 (6th Cir. 1989); *United States* v. *Herbert*, 698 F.2d 981, 986 (9th Cir.), cert. denied, 464 U.S. 821 (1983); see also *United States* v. *O'Mara*, 963 F.2d 1288, 1290-1291 (9th Cir. 1992) (following *Herbert*).

See pp. 15-16, *supra*. As most of the courts of appeals have agreed, addition of a strict knowledge requirement to the statute would defeat that purpose.

2. Later amendments to the NFA do not suggest that Congress has abandoned that original purpose. To the contrary, they demonstrate Congress's increasing concern with semiautomatic rifles that are easily convertible to machineguns. Moreover, Congress amended the NFA and related statutes at a time when the courts of appeals unanimously agreed with the Tenth Circuit's construction of the statute on the issue of intent, which suggests acquiesence in, rather than disagreement with, that construction.

a. As part of the Gun Control Act of 1968, Congress amended and recodified the National Firearms Act. See Pub. L. No. 90-618, Tit. II, § 5861, 82 Stat. 1213, 1227. In revising the Act, Congress also expanded the definition of a "machinegun" to include machinegun frames and receivers, so-called conversion kits for turning other weapons into machineguns, as well as combinations of machinegun parts when in the possession of a single person. See § 5845(b), 82 Stat. 1231. The addition of those provisions demonstrates Congress's continuing concern with the dangers posed by automatic weapons—in particular, the dangers posed by convertible semiautomatic weapons like petitioner's AR-15.

The 1968 amendments also made it unlawful "to make, or cause the making of a false entry on any application, return, or record required by [the Act], *knowing* such entry to be false." See § 5861(*l*), 82 Stat. 1234 (emphasis added) (codified at 26 U.S.C. 5861(*l*)). The absence of a similar contemporaneous revision to Section 5861(d), requiring knowledge of

the particular characteristics of a weapon making it subject to regulation, supports the inference that Congress intended no revision of the generally accepted *mens rea* formulation of that section. As the Court explained in *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987), "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Accord *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981); *Russello* v. *United States*, 464 U.S. 16, 23 (1983). This Court has applied that principle where, as here, the difference in language arose from a later amendment to the statute in question. *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 267-268 (1985).

b. In 1986, Congress enacted the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, 100 Stat. 449. FOPA amended the definition of the term "machinegun" in the National Firearms Act (26 U.S.C. 5845(b)) to include any part designed and intended to be used solely and exclusively for converting any weapon into a machinegun and adopted that definition to govern the term "machinegun" as employed in the Gun Control Act, 18 U.S.C. 921(a)(23), as well. See Pub. L. No. 99-308, §§ 101(23), 109, 100 Stat. 450, 460. The House Committee Report observed that the amended definition "will help to control the sale of incomplete machine gun conversion kits that now circumvent the prohibition on selling completed kits." H.R. Rep. No. 495, 99th Cong., 2d Sess. 28 (1986).[9] That

[9] Relying on an assertion by Senator Hatch during the Senate floor debate on FOPA that "the mere fact of posses-

change was in part the result of a recommendation of the Attorney General's Task Force on Violent Crime. See H.R. Rep. No. 495, *supra*, at 28, citing U.S. Department of Justice, *Final Report of the Attorney General's Task Force on Violent Crime* 29, 32 (Aug. 17, 1981) (noting problems caused by "semi-automatic weapons * * * which can easily be converted to fully automatic weapons by simple tool work or the addition of readily available parts").

FOPA also amended the Gun Control Act of 1968, 18 U.S.C. 921-930, requiring proof of a knowing state of mind for felony violations of that Act.[10] See H.R. Rep. No. 495, *supra*, at 2. Yet Congress did not make any changes to the NFA to require that the government prove under Section 5861(d) that a defendant knew his weapon had all of the physical characteristics subjecting it to regulation.

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sion of a single part designed for a machinegun would not require registration and payment of the transfer tax unless that single part would of itself be capable of converting a weapon to a machinegun," petitioner claims that "the filing of the selector switch [stop], in and of itself, does not make [his] AR-15 a machinegun subject to registration." Pet. Br. 40-41, quoting 132 Cong. Rec. 9603 (1986). Petitioner, however, was not charged with or convicted of filing the selector switch stop or possessing any particular item designed for use in a machinegun. Instead, he was convicted of possessing an AR-15 rifle that had been modified in a number of ways so as to make it a machinegun. Senator Hatch's remarks are therefore of no assistance to petitioner.

[10] FOPA required proof of a "knowing" state of mind as a prerequisite to a conviction for certain violations such as transporting firearms, 18 U.S.C. 922(a)(4), making false or fictitious statements to a dealer in connection with the acquisition of any firearm, 18 U.S.C. 922(a)(6), shipping firearms by a common carrier, 18 U.S.C. 922(f), receiving or possessing

We recognize that it can be hazardous to draw inferences from congressional silence. See, *e.g.*, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969). But "Congress is presumed to be aware of a[] * * * judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (collecting cases). At the time FOPA was enacted, the courts of appeals were in substantial agreement that the owners of "firearms" regulated by the National Firearms Act would be held strictly accountable for ascertaining the characteristics that made them subject to regulation.[11] In enacting FOPA, Congress

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a firearm after conviction for a felony, 18 U.S.C. 922(g), receiving a stolen firearm, 18 U.S.C. 922(j), or transporting, shipping, or receiving a firearm with an obliterated serial number, 18 U.S.C. 922(*l*).

Petitioner cites a statement during the floor debates on the Senate version of FOPA that one of its purposes was to "[m]andate an element of criminal intention for prosecution and conviction of Federal firearms law violations." Pet. Br. 41, quoting 132 Cong. Rec. 9603 (1986) (remarks of Senator McClure). The legislation, however, expressly enumerated the federal firearms law violations to which Congress intended that element of criminal intent to apply. As explained, Section 5861(d) was not one of them.

[11] See cases cited pp. 24-25, *supra*. See also, *e.g.*, *United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984); *United States* v. *Woodruff*, 600 F.2d 174, 176 (8th Cir. 1979); *United States* v. *Cowper*, 503 F.2d 130, 133 (6th Cir. 1974), cert. denied, 420 U.S. 930 (1975); *United States* v. *Gardner*, 448 F.2d 617, 619 (7th Cir. 1971). In 1986, the only court that had departed at all from the consensus was the Ninth Circuit in *United States*

amended the definition of "machinegun" and made other changes in the NFA, applied the NFA definition of "machinegun" to the Gun Control Act, and modified a number of intent provisions of the Gun Control Act. But Congress took no action to overturn the then-unanimous view of the courts of appeals concerning the NFA's intent requirements. Under those circumstances, it is proper to infer that Congress did not wish to alter existing law.

D. The Rule Of Lenity Has No Application In This Case, Because The Statute Is Not Ambiguous

Petitioner contends (Br. 45-50) that the rule of lenity should be applied to this case. The rule of lenity, however, "is reserved for cases where, [a]fter sei[zing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks omitted). Thus, the rule of lenity is applicable, if at all, only "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v.

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v. *Herbert*, 698 F.2d 981, 986 (9th Cir.), cert. denied. 464 U.S. 821 (1983). That decision was at best only a minor departure. The Ninth Circuit had previously approved an instruction virtually identical to that given in this case. *United States* v. *Thomas*, 531 F.2d 419, 421 (9th Cir.), cert. denied, 425 U.S. 996 (1976). As later cases have made clear, *Herbert* holds that instruction to be inadequate only in cases in which "the external appearance was not sufficient, by itself, to put the defendant on notice that he possessed a dangerous device that was likely to be regulated." *United States* v. *Kindred*, 931 F.2d 609, 612 (9th Cir. 1991). Accord *United States* v. *O'Mara*, 963 F.2d 1288, 1290-1291 (9th Cir. 1992). See note 8, *supra*.

United States, 498 U.S. 395, 410 (1991) (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)).

Section 5861(d) is not ambiguous. Nothing in the language of the statute suggests that it requires proof that the defendant knew the specific characteristics of a proscribed firearm. The construction adopted by the Tenth Circuit in this case and by most other courts of appeals follows directly from a series of decisions by this Court. Moreover, Congress's refusal to add such a requirement to the statute, in light of then-unanimous judicial decisions rejecting it and in light of Congress's contemporaneous addition of similar requirements elsewhere in the NFA and in related statutes, makes clear that Congress was fully satisfied with the *mens rea* formulation adopted by the courts of appeals up to that time and did not intend to change it.

Nor is the majority formulation of the knowledge element of Section 5861(d) "so 'absurd or glaringly unjust,'" *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984), as to call into question Congress's intent. It is highly unlikely that a weapon purchased from a lawful outlet, such as a sporting goods store, would turn out to be a registrable firearm under the NFA, and purchasers from such outlets accordingly have little to fear. Moreover, even when a weapon is acquired on the street or altered by its owner, the fact that it is of a type subject to registration under the NFA will ordinarily be obvious to even a casual observer.[12] That is particularly true in the case of

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[12] That was true in this case. As the government's exhibits at trial demonstrated, it was obvious from a glance that the selector switch stop on petitioner's AR-15 had been filed

machineguns, since any ambiguity as to their automatic firing capability is likely to be resolved as soon as the trigger is pulled. Petitioner essentially proposes to construe the statute to protect individuals who acquire registrable firearms on the street or by altering an existing weapon, but who fail to familiarize themselves with the characteristics of their newly acquired or newly altered weapons. To adopt that proposal would frustrate Congress's purpose to require registration of such highly dangerous devices and thus keep them out of the hands of criminals.[13] Accordingly, the rule of lenity has no role here.

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down. See Gov't Exhibits 10A-10C (pictures of petitioner's weapon).

[13] Moreover, petitioner's proposal would impose on the government a frequently insurmountable evidentiary hurdle. As the dissenting judges in *United States* v. *Anderson*, 885 F.2d at 1262, observed:

> Where law enforcement officials find only weapons, unaccompanied by corroborating evidence * * *, it may be difficult to prove the possessor's knowledge of the weapon's characteristics. The defendant may not testify, or may testify that he or she was unaware that the guns were automatic. The prosecution then would depend upon circumstantial inferences that may be difficult to establish beyond a reasonable doubt. In such cases, the will of Congress to control the possession of crime-facilitating dangerous firearms [would] be unduly thwarted by virtue of [a ruling imposing such a burden].

Compare *United States* v. *Balint*, 258 U.S. at 254 (Congress omitted rigorous knowledge requirement from Narcotics Act due to "considerations as to the opportunity of the [defendant] to find out the fact and the difficulty of proof of knowledge").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60329